TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 22.

C. P. DEWEY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DES MOINES, C. H. DILWORTH, TREASURER OF POLK COUNTY, AND THE DES MOINES BRICK MANUFACTURING COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

FILED JUNE 11, 1897.

(16,608.)

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INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 3, 1897.

a Pleas before the supreme court of Iowa in a cause entitled C. P. Dewey, appellant, against City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, appellees.

Be it remembered that on the 3rd day of December, 1895, there was filed in the office of the clerk of the supreme court of Iowa a printed abstract of record, the same being in the words and figures following, to wit:

1 In the Supreme Court of Iowa, January Term, 1896.

C. P. DEWEY, Plaintiff and Appellant,
vs.
CITY OF DES MOINES, C. H. DILWORTH, Treasurer of Polk County, and Des Moines Brick Manufacturing Company, Defendants and Appellees.
} Appeal from Polk County District Court. In Equity.

Hon. C. P. Holmes, judge.

Gatch, Connor & Weaver, attorneys for appellant.
J. K. Macomber, attorney for City of Des Moines and C. H. Dilworth, appellees.
Guerusey & Baily, attorneys for Des Moines Brick Manufacturing Company, appellee.

Appellant's Abstract of the Record.

2 On April 30, 1894, the plaintiff filed his

Petition

against the City of Des Moines, and C. H. Dilworth, county treasurer, which petition as amended, was as follows:

Comes now the plaintiff, C. P. Dewey, and for cause of action against the defendants, City of Des Moines and C. H. Dilworth, treasurer, states:

Paragraph 1. That plaintiff is now and for more than five years last past has been a citizen of the State of Illinois and a resident of the city of Chicago, in said State. That in the year 1888 plaintiff became, and ever since has continued to be, the owner of sixty lots in Central Park, said lots being numbered consecutively from seventeen (17) to seventy-six (76) inclusive. That Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, in the year 1886. That when Central Park was platted into lots, said land and lots were situated outside of the then corporate limits of the city of Des Moines; but that by the provisions of chapter 1, Acts 23 G. A. of Iowa (1890), it was claimed that Central Park and other territory in the neighborhood, extending two and one-half miles eastward from Twenty-

second street (which street extended north and south along the eastern boundary of said city as then constituted), were annexed to and became part of the city of Des Moines; but plaintiff alleges that such alleged annexation was illegal and void for the reasons hereinafter set out, and that plaintiff's lots were not legally annexed to said city.

Par. 2. That the city of Des Moines is a municipal corporation organized under the general incorporation law of the State of Iowa; and the other defendant, C. H. Dilworth, is the duly elected and acting county treasurer of Polk county, Iowa.

Par. 3. That on or about May 11th, 1891, the city council of the city of Des Moines adopted the following resolution: "That it is hereby declared necessary that East Grand avenue from Eighteenth street to the State fair grounds be improved by paving and curbing." And on the same day the city council adopted the following further resolution: "That the board of public works be instructed to advertise for bids for curbing and paving East Grand avenue from Eighteenth street to the State fair grounds, the same to be curbed with artificial stone and paved with brick." That thereafter and on April 15th, 1892, the following proceedings were had by
3 the city council of said city: "The board of public works presented a contract of J. B. Smith & Co. for paving East Grand avenue from Eighteenth street to the State fair grounds, and by motion approved." That thereafter and between April, 1892, and June, 1893, a brick pavement was laid down upon East Grand avenue between the points designated in the foregoing resolutions of the city council, said paving being upon the street opposite the lots hereinbefore described, owned by plaintiff, each and all of said lots abutting upon said East Grand avenue, and each of said lots having a frontage of forty feet and an average depth from the street line of one hundred thirty-seven and one-half feet (thirty of said lots having a depth of one hundred and forty-five feet each and thirty having a depth of one hundred and thirty feet each). That against each of the lots owned by plaintiff, and hereinbefore described, there was assessed as the proportional share of such lot, and against the plaintiff as the owner thereof, the sum of $148.80 for the cost of the paving of said street, and against the entire sixty lots owned by plaintiff the aggregate sum of $8,928 was assessed, such apportionment and assessment being made on or about May 19, 1893, and approved by the council on June 12, 1893, which tax plaintiff has refused to pay, claiming the same to be illegal and void for the reasons hereinafter set out.

Par. 4. That the said tax of $8,928 principal has been certified by the city clerk of said city to the county auditor of Polk county, and by the county auditor of said county has been placed upon the books of the county treasurer, said defendant Dilworth, and said Dilworth as treasurer is attempting to enforce and collect the said tax with a penalty or interest of one per cent. a month; and that both defendants claim that the plaintiff is personally liable for the payment of said tax with interest and penalties and will enforce payment thereof unless restrained by the order and decree of this

court. That said alleged tax is a cloud upon the title of the real estate of this plaintiff, and the personal property of this plaintiff is liable to be illegally seized for the payment of said alleged tax, and plaintiff has no remedy as against the enforcement of the same except in obtaining such relief as may be granted by a court of equity.

Par. 5. That plaintiff had no actual notice or knowledge of the resolutions of the city council aforesaid to pave said street until after the completion and acceptance of the work on same, nor did he have any such notice or knowledge of said special tax until he applied to the county treasurer of Polk county for a statement of the general taxes upon his property, in the month of March, 1894. That plaintiff had no actual notice or knowledge that paving certificates had been issued against his property, hereinbefore
4 described, nor had he any notice or knowledge of the right or opportunity to sign the waiver upon such paving certificates, provided for in the statute and ordinance under which said work was done; and plaintiff had no constructive knowledge in respect to any of the matters aforesaid, except such as might be afforded by the publications in newspapers in the city of Des Moines and posting notices along the street in respect thereto. That the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same.

Par. 6. That the resolutions to pave said street and the order directing said work to be done were oppressive, collusive, fraudulent and void. That in the year 1886 the highway now called East Grand avenue was laid out and opened under the order and directions of the board of supervisors of Polk county, Iowa. That said highway was laid out and opened one hundred feet wide and was at that time in a fair condition for public travel. That said highway between the points designated in the resolution of the city council as Eighteenth street on the west and the fair grounds on the east was worked and improved between 1886 and April, 1890, so that it became a first-class country road and was traversed largely by vehicles passing from the city to the State fair grounds and returning, during the four years last mentioned. That in 1886 the fair grounds of the State Agricultural Society of Iowa were established about one mile east of the eastern limits of the city of Des Moines as then established, and that said highway now known as East Grand avenue was thereafter largely used and traveled in reaching said fair grounds and there was no complaint or objection to such roadway, except that it was somewhat dusty in dry weather.

That in the year 1890, when the attempt was made to extend the

eastern limits of the city of Des Moines two and one-half miles farther to the east, as hereinafter set out, the directors of the State Agricultural Society solicited the city council of Des Moines to cause East Grand avenue to be curbed and paved from Eighteenth street, being near the eastern limit of said city, before such alleged annexation, eastward to the State fair grounds, the reason assigned being the great benefit which would accrue to said State Agricultural Society in holding its annual State fair. That there was no real necessity for paving or curbing said street between Eighteenth street and the State fair grounds, so far as the property or interests of persons residing or owning property along said street were concerned. That the distance between the points just mentioned is something over one mile, but in that entire distance and on both sides of said street there are now only four small and inexpensive houses, and some of them were not built when the street was ordered improved in 1891. That along said street on both sides, between the points just mentioned, there are no stores, shops, factories or buildings of any description whatever, except only the four small dwelling-houses just mentioned; and the owners of said four improved lots were opposed to the paving of the street. That all the property-owners on both sides of said street, between Eighteenth street and the State fair grounds, were opposed to the paving and curbing of said street at the expense of abutting property, and many of said owners protested to the city authorities against such improvement; but that said city council at the solicitation and sole instance, and for the benefit alone of the State Agricultural Society and its directors, and in collusion with said society and directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions of necessity and ordered said work to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff and of others abutting upon said street. That between Eighteenth street on the west and the State fair grounds on the east, along and abutting upon said East Grand avenue, there is a strip of land abutting on the north side of said street, and extending 1,697 feet, and a strip of land abutting on the south side extending the same distance, which tracts have never been laid off into lots of ten acres or less, but form part of a tract of ninety-seven acres which is now and at all times previous since being surveyed by the Government, has been used in good faith alone for agricultural purposes. That the balance of the land between Eighteenth street and the fair grounds, so far as the same abuts upon the street, has been laid off into a fringe of lots on each side of the street, behind which fringe of lots the land is unplatted and is used in good faith for agricultural purposes; but said lots on either side of said street, except the four hereinbefore mentioned, have not been built upon or in any manner occupied, fenced or used, otherwise than they were used before the map or plat was made designating them as lots. And plaintiff alleges that the State Agricultual Society, a private corporation under the laws of Iowa, holds a fair on its grounds lying immediately east of Twenty-eighth street in such alleged extended

limits of said city, on or about the first week of September in each year; that large numbers of people visit such fair each year
6 from all sections of the State, and that East Grand avenue is and has been the most direct and convenient highway to said fair grounds for wagons, horses and cattle and persons having them in charge. That under the circumstances aforesaid, and at the solicitation of the directors of said State Agricultural Society, the said city council, desiring to aid said agricultural society, and well knowing that the paving of said highway was unnecessary except alone for the purpose aforesaid, and well knowing that such paving would be of no benefit to the owners of abutting property and was unnecessary for any city use or purpose, or for the use or purpose of the people living along said street or living in any other portion of the city, and also well knowing that the cost of the paving alone (which was ordered to be laid forty-two feet in width along said street), aside from the cost of curbing and sidewalks, would largely exceed the market value of abutting lots one hundred and fifty feet in depth; knowing all these matters, nevertheless, the said city council, fraudulently and collusively and oppressively, and to the great oppression and wrong of plaintiff and other owners of abutting property along said street, ordered the same to be curbed and paved as aforesaid and caused said work to be done, and assessed the entire cost thereof against the owners of abutting property along said street.

Amendment to Petition.

The plaintiff, by leave of court, amends his petition herein by adding thereto the following allegations, to wit: (Filed May 6, 1894.)

Par. 6*a*. That the special assessment against plaintiff's said lots, and against each of them, for the contract price of said work, is unauthorized and void because the city of Des Moines did not conform to or comply with the statute in publishing proposals for said paving, or in letting the contract under which said work was done. That the statute in force in said city, regulating the paving of streets and the assessment of the cost against the owners of abutting property, at the time the contract for said work was legally entered into, to wit, April 15, 1892, was chapter 14 of the Acts of the Twenty-third General Assembly, as amended by chapter 12 of the Acts of the Twenty-fourth General Assembly. That by the terms of said amendment, which took effect by publication on the 5th day of April, 1892, the provisions of chapter 14, Acts of the Twenty-third General Assembly, were made applicable to "all cities in this State containing, according to any legally authorized census or enumeration, a population of over 4,000," and thereby included and referred to the city of Des Moines, which then had by the last legal census a population of over 4,000.

7 That section 3 of said chapter 14, Acts of the Twenty-third General Assembly, is as follows:

"All such contracts shall be made by the council or the board of public works, when such board shall exist, in the name of the city, and shall be made with the lowest bidder or bidders upon sealed

proposals, after public notice for not less than ten days in at least two newspapers of said city, which notice shall state as nearly as practicable the extent of the work, the kind of material to be furnished, when the work shall be done, and at what time the proposals shall be acted upon."

That the city of Des Moines at all times in the year 1892 had a legally established and acting board of public works, and that said board of public works caused to be published in two newspapers in said city for a sufficient length of time, beginning on February 8, 1892, and terminating on February 27, 1892, a notice or proposal to bidders in the following form:

"*Proposals for Paving.*

"Sealed proposals will be received by the board of public works of the city of Des Moines at their office in the city hall until 12 o'clock noon, February 29, 1892, for paving with brick East Grand avenue from Eighteenth street to the west line of the fair grounds, according to the plans and specifications for said work now on file in our office. Each bid must be accompanied by a bond in the penal sum of $1,000, conditioned that the bidder, in case the work is awarded him, shall enter into a contract with the city. In lieu of a bond a certified check equal to the above amount will be received. The board reserves the right to reject any and all bids.

R. S. FINKBINE,
R. L. CHASE,
Board of Public Works."

That on the date mentioned bids for said work were received and opened, and on March 15, 1892, the board awarded the contract to J. B. Smith & Co. at $1.60 per square yard, and on the same day a contract was signed by the board of public works on behalf of the city and by said J. B. Smith & Co. That said written contract contained among other things this provision: "It is hereby expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city." That the clause just referred to was inserted in said contract in compliance with the provisions of section 5 of chapter 1, Acts Twenty-second General Assembly, prescribing the powers and duties of boards of public works, as follows: "All contracts made and entered into by said board shall be subject to the approval of the city council."

8 That the "plans and specifications for said work now on file in our office," referred to in said published notice to bidders, contained no statement or suggestion as to the extent of the work, or as to the time within which the work should be done, or as to the time when the proposals should be acted upon; nor did said specifications provide or prescribe whether the paving should be laid with one or two rows of brick; nor did said specifications contain any statement of or reference to the distance from Eighteenth street to the west line of the fair grounds, nor to the width of the roadway of said street, from curb to curb, to be paved by the

contractor. That no proposal or notice to contractors was published before entering into said contract except only the "Proposals for paving" herein set out. A copy of the contract is hereto annexed, marked Ex. B, and made part of the petition.

That no binding contract in respect to said work existed between the city of Des Moines and said J. B. Smith & Co. prior to April 15, 1892, when said contract was approved by the city council. That at said date the provisions of section 3 of chapter 14, Acts Twenty-third General Assembly, were in force in the city of Des Moines. That at said date no valid contract for paving said street could be entered into without the publication of proposals of the character and form mentioned in said section 3, and that the proposals for paving, published in February, 1892, were insufficient to authorize the letting of the work, in this:

First. The extent of the work was not stated therein; neither the number of square yards, nor the quantity of brick, nor the distance in feet or yards or otherwise from Eighteenth street to the State fair grounds, nor the width of the roadway to be paved. That in fact, the distance was about one mile, and the street was paved forty-two feet wide the entire distance, with two rows of brick placed upon a foundation of sand, the lower row of brick being laid flat on the sand and the upper row on the edge of the brick; and the entire cost of the work was $56,891.21.

Second. It was not stated in said proposals "when the work shall be done;" but the contract contained on that subject the following provisions: "The said J. B. Smith & Co. hereby agree to commence said work within ten days after the water pipes are laid and complete the same in ninety days thereafter, provided said water pipes are laid by August 15, 1892." And this further provision: "It is expressly understood that * * * the water pipes be put in said street before the work shall be commenced by the said J. B. Smith & Co." The water pipes referred to were being laid to the State fair grounds, for the sole use of the State Agricultural Society in holding its fairs, and not for the use of residents along said street;
9 said water main not being connected with any residence on said street east of Eighteenth street. That in fact said work was not begun until late in the fall of 1892 and was not completed until the latter part of May, 1893.

Third. That said board failed to state in said notice to bidders, "at what time proposals shall be acted upon;" that in fact said proposals were not acted upon until March 15, 1892; and that, under said notice, it was a matter of discretion with said board when the proposals submitted should be accepted or rejected.

And plaintiff alleges that, by reason of the failure of the board of public works to publish the notice to bidders required by statute, the letting of the contract for the work in question was unauthorized and void, there being no opportunity for real competition among bidders, and the assessment for the contract price is not a valid lien against the property of plaintiff.

Par. 6*b*. Plaintiff further alleges that, under the statutes relating to the paving of streets in force in the city of Des Moines in the

year 1892, prior to the 5th day of April in said year, the published proposals to bidders set out in paragraph 6a were insufficient to authorize the letting of said contract, in the respect of the failure to state therein the amount of work to be done; and that there was no statute in force in said city in the months of February and March, 1892, which would authorize the letting of the contract in question upon the notice to bidders contained in the published proposals hereinbefore set out; and that whichever statute was in force in February and March, 1892, the assessment in question is void.

Par. 6c. Plaintiff further alleges that the work was not done according to the contract and specifications but was defective in the respect that a large proportion of the brick put into said pavement was very soft and imperfectly burned, when the contract and specifications for the work required the bricks to be hard and well burned; and in the further respect that the quantity of sand bedding used was only about one inch in depth in many places when the specifications required four inches. That said pavement was defective and insufficient and not in compliance with the contract and specifications, in many other respects, which plaintiff will establish, in the event that the assessment heretofore made shall be set aside, and the plaintiff is afforded an opportunity, upon a reassessment or otherwise, to prove the defective character of the work. Plaintiff further alleges that information of the inferior character of the work was communicated to the board of public works before said work was accepted; that one of the paving inspectors reported to the board, before its acceptance, the inferior character of the brick used and the insufficiency of the sand foundation; that said fact was also reported by said inspector to the city engineer of said city; but that the city engineer and the board of public works disregarded the information given by said paving inspector, made no personal examination of said work, made no personal inspection of the brick being used by the contractors, and relied and acted upon the statements of the contractors. That the said contractors falsely and fraudulently represented and pretended to the city engineer and board of public works that the brick being used by them in said work were sound and hard and well dried and burned, as required by the contract and specifications, when in fact said brick were rotten, soft and imperfectly dried and burned, and not such as the contract and specifications called for. That said brick pavement, after one year's use, has become soft, broken and decayed, showing clearly the soft and imperfect quality of the brick used therein. That said contractors falsely and fraudulently represented and pretended to said engineer and board that they were putting in a sand foundation four inches in depth under said pavement, as required by said contract, when in fact the sand foundation would not average two inches in depth and in many points not over one inch in depth; by reason of which said pavement has become uneven, the bricks turning up on the side and becoming broken and disjointed. In consequence of these defects the pavement was not worth one-half the contract price.

And plaintiff alleges that, by reason of the foregoing, the city engi-

neer and the board of public works, in collusion with and by reason of the false and fraudulent representations of the said J. B. Smith & Co., accepted the said work on the part of the city, having information that it was not done in accordance with the contract and specifications; and plaintiff further alleges that the facts herein set forth can be established by him in case the assessment heretofore made shall be set aside and the opportunity afforded, in making a reassessment or otherwise, if a reassessment should be attempted to be made.

Where*of* plaintiff prays, in addition to the relief prayed for in his original petition, that the assessment for the contract price may be decreed to be unauthorized and void and may be set aside, and that the paving certificates issued by authority of the city may be cancelled and set aside.

Par. 7. And plaintiff further alleges that the city of Des Moines had no power or authority to cause said East Grand avenue to be paved from Twenty-second street to the State fair grounds and opposite the property of this plaintiff, for the reason that the territory lying eastward of Twenty-second street was never lawfully annexed to, nor did said territory ever lawfully become a portion of the said city of Des Moines, and is now and always has been outside the corporate limits of said city. That an action at
11 law is now pending in this court, being No. 6149, law, entitled, "The State of Iowa, plaintiff, on the relation of A. G. West *vs.* The City of Des Moines, defendant." That said action is a petition in the nature of an information in *quo warranto*, to test in that manner the legality of the annexation of certain territory hereinafter described, in which territory the lots owned by plaintiff are situated, but said lots not being in 1890 or at any other time a part of any incorporated city or town. That plaintiff has no remedy or standing in court as a relator in an action of *quo warranto*, for the reason that plaintiff has never been a citizen of the State of Iowa. That plaintiff can only have relief against the unlawful attempt to annex the lots owned by him to said city of Des Moines by this his suit in equity. And plaintiff avers that, if it shall be held that he is not entitled in equity to assail the validity of the attempted and alleged annexation of his said lots to the city of Des Moines, then he is entitled to have a sale of his said lots restrained by injunction until said *quo warranto* action shall have been finally determined in this court and in any court to which it may be appealed. That in said *quo warranto* action the defendant has appeared and made defense, and said action is being prosecuted in good faith and with proper diligence.

Par. 8. That said city of Des Moines was originally incorporated under and by the provisions of chapter 185, Acts Sixth General Assembly of Iowa, approved January 28, 1857; the title of said act being, "An act to incorporate the city of Des Moines, in Polk county;" which act is hereby referred to and made part of this petition as fully as if incorporated therein.

That by section 1 of said act it was provided "that all that portion of the State of Iowa, included within the following limits, to

wit: Beginning at the northeast corner of section 2, township 78, range 24, west fifth P. M. Iowa; thence west to the northwest corner of section 5, township and range aforesaid; thence south to the southwest corner of section 8 in said township; thence east to the southeast corner of section 11 in said township; thence north to the place of beginning, be, and the same is hereby declared a city corporate, by the name of Des Moines; and the inhabitants thereof are created a body corporate and politic, by the name and style of Des Moines; and by the name and style aforesaid, shall have perpetual succession, shall have and use a common seal, which they may alter, change and renew at pleasure, and shall have power to sue and be sued, plead and be impleaded, defend and be defended in all courts of law and equity, to purchase, receive and hold property, both real, personal or mixed, and to improve, protect or sell, lease, convey or dispose of the same; and for the better ordering and governing of said city, the exercise of the corporate powers of the same,
12 hereby granted, and the administration of its fiscal, prudential and municipal concerns, with the conduct, government and direction thereof, shall be vested in a mayor and aldermen, consisting of fourteen members, to be denominated the city council; together with such other officers as are hereinafter provided for."

That by the provisions of said act of incorporation the territory comprised within the limits of the city of Des Moines comprised eight square miles, being four miles east and west and two miles north and south, and no more.

That thereafter, upon the adoption of the constitution of 1857, chapter 157, Acts of the Seventh General Assembly, was approved, the same constituting chapter 51 of the Revision of 1860; said statute among other things authorizing cities organized under special charters to become incorporated under the general incorporation law of the State.

That thereafter, in May, 1863, such proceedings were had by the city of Des Moines, its electors and legally constituted authorities, that the said city of Des Moines, on May 11, 1863, organized under the general incorporation laws of the State and abandoned its special charter, which proceedings were ratified and approved by the provisions of chapter 99, Acts Twelfth General Assembly, approved April 6, 1868, said act being entitled, "An act to legalize the acts of certain cities and towns in their attempts to amend and abandon their special charters, and to legalize elections, ordinances enacted, and other proceedings had by said cities and towns." That ever since May 11, 1863, the city of Des Moines has been organized and acting as a city under the general incorporation laws of the State of Iowa; and that the territorial limits of said city continued the same as fixed in and by chapter 185, Acts Sixth General Assembly aforesaid, until the enactment of chapter 1, Acts Twenty-third General Assembly, and the proceedings had thereunder, hereinafter referred to.

That thereafter, to wit: March 13, 1890, an act of the General Assembly was approved entitled, "An act to extend the limits of cities and for other purposes incident thereto," being chapter 1, Acts

Twenty-third General Assembly of Iowa. That section 1 of said act is as follows:

"SECTION 1. That the boundaries of all cities in this State, which had, by the State census of 1885, a population of 30,000 or more, are hereby extended two and one-half miles in each direction from the present boundaries of said cities. Such extension being so made as to leave the boundaries hereby created in a perfected rectangle; that all the territory embraced within said extended boundaries, whether the same is contained in cities, incorporated towns or other-
13 wise, shall be and become a part of the city and subject to its jurisdiction and authority; and that the corporate character of any annexed territory within the extended boundaries herein specified shall cease and determine; provided, that if any one of such outside boundary lines, as extended by this act, shall come within two miles of a county line, such boundary line on such side shall extend only one and one-half miles beyond the present boundary line of such city; provided, further, that nothing herein contained shall affect the rights of existing creditors, or present boundaries or existing conditions of school districts."

That when said chapter 1 was approved and published the city of Des Moines was the only city in the State of Iowa "which had, by the State census of 1885, a population of thirty thousand or more;" and that said act applied alone to the said city of Des Moines and could not apply to any other city in the State, nor could said act apply by its terms to any other city after attaining a population of thirty thousand or more. That by the terms of said chapter 1 the territory of said city of Des Moines was so extended that it was nine miles east and west and six miles north and south, and its boundaries as thereby created formed "a perfected rectangle" as required by the provisions of the act, and the conditions therein referred to were applicable to no other city in the State except the city of Des Moines. That the territory comprised within the limits of said city, as sought to be extended by said chapter 1, comprises fifty-four square miles, and added to the original limits of said city forty-six square miles. That of the forty six square miles of territory attempted to be annexed to the said city of Des Moines, only about one-eighth has ever been platted or subdivided into lots, and that the other seven-eighths are unplatted and used exclusively for agricultural or horticultural purposes or unused for any purpose except as an open common. That when chapter 1, Acts Twenty-third General Assembly, was approved, North Des Moines had become a city of the second class, and all of the territory therein was attempted to be annexed by chapter 1 aforesaid. That within the territory thus attempted to be annexed were also located the incorporated town of Greenwood Park, the incorporated town of Grant Park, the incorporated town of Sevastopol and others; and that by the provisions of said section 1 of said chapter 1, said incorporated city of the second class and all of said incorporated towns were attempted to be annexed to the city of Des Moines, and thereby their corporate powers were made to cease and determine. That the south boundary line of the city of Des Moines, if extended for a distance

of two and one-half miles, as provided in section 1 of said chapter, would have "come within two miles of a county line," to
14 wit: the north county line of Warren county; and it was therefore provided in said section 1 in effect that the south boundary line of the city of Des Moines "shall extend one and one-half miles beyond the present boundary line of said city." That nearly all, if not all, of the incorporated towns sought to be annexed by said chapter 1 were owing corporate debts, and that the provisions of section 2 of said chapter 1 were intended to control and provide for the manner in which the corporate debts of such annexed municipal corporations should be paid; and the closing provisions in said section 2, referring to real estate owned by such annexed corporations, referred to real estate in fact owned by the incorporated towns hereinbefore mentioned which were by said chapter 1 attempted to be annexed to the city of Des Moines.

That under the provisions of sections 4 and 5 of said chapter 1, commissioners were appointed by the governor for the purpose of reorganizing the wards within the limits of said city of Des Moines as extended, and such proceedings were had therein that the provisions of sections 4 and 5 were substantially complied with. That section 6 of said chapter refers to certain litigation at that time pending between Ford, Weston, Franz and others against the town of North Des Moines and others. That said litigation was then pending in the supreme court of the State of Iowa and resulted in the decision and opinion entitled "Ford *vs.* Town of North Des Moines and others," 80 Iowa, 626; which opinion and decision the plaintiff refers to as if set out verbatim herein, as a portion of the public history connected with the enactment of said chapter 1, Acts Twenty-third General Assembly, and the annexation proceedings connected therewith.

That at the time aforesaid there was no other city in the State, except only the city of Des Moines, which had contiguous or adjacent to it a city of the second class and one or more incorporated towns, all located within two and one-half miles of the original limits of such city; and that at the date of said annexation law there was no other city in the State of Iowa, except only the city of Des Moines, which by extending its limits two and one-half miles would thereby include another city and one or more incorporated towns.

That the commissioners referred to in section 4 of chapter 1 aforesaid, appointed by the governor and having power to divide such enlarged city into wards and perform other duties, were not appointed in any other city except only the city of Des Moines, and there was no other city in which such commissioners could be appointed under the terms of said act.

That the provisions of section 5 of said act, for the termination of the terms of office of all the officers of such city, refer alone to the city of Des Moines, and could have no reference to any
15 other city in the State; and that by force of said act all the officers of the city of Des Moines, in office when the same was approved, were ousted and their official functions came to an

end, but that the act did not affect any other city in the State, or terminate the office of any officer in any other city of the State, and had no effect or operation in any other city.

That under and by virtue of said section 5 of chapter 1, a full set of officers, as provided by the general incorporation laws of the State, was elected in said year in the city of Des Moines, on the first Monday in April, 1890, and also a full city council, and that the provisions of said section 5, fixing the date of the annual election and providing for the election of a city council and of all city officers at such time, has since been in force in said city of Des Moines and has not been in force in any other city of the State, and all other cities of the first class in the State hold their elections on the first Monday in March, as provided by the general statute, and elect a portion of their officers on even-numbered and a part on odd-numbered years.

That thereafter, on July 15, 1890, the city council of the city of Des Moines adopted an ordinance which was duly approved and published, entitled, "An ordinance describing the boundaries and wards of the city of Des Moines," by section 1 of which the boundary and limits of the city of Des Moines are described and set out, and prescribing the limits of the several wards in said city. A copy of said ordinance is hereto annexed, marked Exhibit A, and made part of this petition.

And plaintiff alleges that since the date of said ordinance, to wit, July 15, 1890, and continuously until now, the said city of Des Moines, without any lawful warrant, grant or charter, has exercised powers not conferred by law, and is so doing, over the territory attempted to be annexed to said city by said chapter 1, Acts Twenty-third General Assembly, and over the territory described in said ordinance of July 15, 1890 (Exhibit A hereto), except only the eight square miles originally included within the corporate limits of said city by its act of incorporation hereinbefore set out, being chapter 185, Acts Sixth General Assembly, over which territory last described said city rightfully exercises its jurisdiction. That the powers exercised by said city of Des Moines, and which it continues to exercise, over said annexed territory, consist, among other things, in declaring said annexed territory to be a portion of the several wards of said city, in levying taxes for city purposes upon the real estate situated within such annexed territory, and in levying upon property abutting upon the highways therein special assessments for curbing, paving and sewer purposes, and in exercising generally all the powers conferred upon cities organized under the general incorporation law over the territory lying within the forty-six
16 square miles hereinbefore described and claimed to be annexed to said city, the same as within the original limits thereof, consisting of the eight square miles aforesaid.

And plaintiff alleges that the exercise of such corporate powers and functions within the territory thus sought to be annexed is contrary to law in this, that said chapter 1, Acts Twenty-third General Assembly, is unconstitutional and void. That said statute is a local or special law within the prohibition of section 30 of article 3 of the

constitution of this State, and also within the prohibition of section 1 of article 8 of said constitution. That said chapter 1 is in substance an amendment to the special charter of the city of Des Moines or an amendment to its charter alone to the exclusion of other cities similarly situated; or, if not within that prohibition, then said act is a special or local law in a case where a general law could be made applicable, and in which there was upon the statute book a general law providing for annexation of contiguous territory to cities, and for the consolidation of existing cities and towns. That said chapter 1 was also in effect an amendment to the charters of each of the incorporated towns lying within the annexed territory, in that, that their existing charters were extinguished and the charter of the city of Des Moines was made operative within the limits of each of said incorporated towns. That, in effect, by said chapter 1, a new corporation was created, in which the adjoining incorporated towns and other territory adjacent to said old city limits, with the inhabitants thereof and the property therein situated, were made to constitute integral parts of said new corporation thus created; all contrary to the provisions of section 30 of article 3 and of section 1 of article 8 of the constitution.

Plaintiff further alleges that said chapter 1, Acts Twenty-third General Assembly, if the same is to be deemed a law of a general nature, has never had, and cannot have, a uniform operation as required by section 6 of article 1 of the constitution; and that said chapter 1 aforesaid is in form and substance in violation of section 6 of article 1 of the constitution, and is null and void, if said act is to be deemed in any event a law of a general nature.

Wherefore plaintiff prays the court that a temporary injunction may issue herein prohibiting the sale of all or any of plaintiff's said lots by the defendant C. H. Dilworth, as county treasurer, for the payment of said special tax or any portion thereof, and prohibiting the enforcement of said tax or any portion thereof against other property of plaintiff, or as a personal debt of plaintiff; that on final hearing said tax may be decreed to be unauthorized, fraudulent and void, and that said tax may be canceled upon the books of said county treasurer and decreed to be neither a lien on said lots hereinbefore described nor a personal debt against plaintiff; in
17 the event this court declines to adjudicate the question of the validity of the annexation of the territory in which plaintiff's lots were included, then plaintiff prays that the final decision of this cause may await the determination of that question in the *quo warranto* proceedings now pending and in the meantime may enjoin the sale of plaintiff's lots; and plaintiff prays judgment for costs and such other, further and different relief as he may be entitled to in equity.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

(Duly verified.)

EXHIBIT A.

An ordinance describing the boundaries and wards of the city of Des Moines.

SECTION 1. Be it ordained by the city council of the city of Des Moines, That the boundaries of said city are defined and hereby declared to be as follows: Commencing at the center of section 23, in township 78, north of range 25, west of the 5th P. M.; thence east along the east and west center lines of sections 23 and 24, township and range aforesaid; sections 19, 20, 21, 22, 23, and 24, township 78, range 24; sections 19 and 20, township 78, range 23, to the center of section 20, township 78, range 23; thence north along the north and south center lines of sections 20, 17, 8, and 5, township 78, range 23, to the quarter-section corner on the north line of section 5 aforesaid; thence north on a continuation of said center line last mentioned to the east and west center line of section 21, township 78, range 23; thence west on the east and west center lines of sections 21, 20, and 19 of township 79, range 23, and sections 24, 23, 22, 21, 20, and 19 of township 79, range 24, and section 24 of township 79, range 25, to a point where a continuation of the north and south center line of sections 2, 11, 14, and 23, in township 78, range 25, intersects said east and west center line last mentioned; thence south on a continuation of the north and south center line of sections 2, 11, 14, and 23 last mentioned to the quarter-section corner on the north line of said section 2; thence south on the north and south center line of sections 2, 11, 14, and 23, in township 78, range 25, to the center of said section 23; and the authority and jurisdiction of the city and its officers shall be coextensive therewith in all cases.

SEC. 2. That the territory embraced in said city shall be and is divided into seven (7) wards, of which the boundaries are defined in the report of the commissioners appointed under the provisions of chapter one (1) of the Acts of the Twenty-third General Assembly of Iowa, which report is on file in the office of the clerk of
18 the district court of Polk county, Iowa, and a duplicate thereof is on file in the office of the city clerk of the city of Des Moines.

SEC. 3. That chapter one (1) of the Revised Ordinances of 1889, and all other ordinances and parts of ordinances in conflict with this ordinance, are hereby repealed.

SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication as provided by law.

Passed July 15th, 1890.

EXHIBIT B.

Contract.

This article of agreement, made and entered into by and between the City of Des Moines, Iowa, party of the first part, and J. B. Smith & Co., of the city of Des Moines, Iowa, party of the second part,

Witnesseth, that the said J. B. Smith & Co. have agreed to and with the city of Des Moines, and do hereby agree to and with said city, to furnish at their own cost and expense all necessary material and labor to build and construct in a good, firm, substantial and workmanlike manner the following-described paving, to wit: Grand Avenue street, beginning at East Eighteenth street to the Iowa State fair grounds, strictly in accordance with the manner and under the conditions set forth in the plans and specifications hereto attached and made a part of this contract. The said J. B. Smith & Co. hereby agree to commence said work within two days after water pipes are laid, and complete the same in ninety days thereafter, provided said water pipes are laid by August 15, 1892.

It being understood and agreed, in case the said J. B. Smith & Co. shall fail to enter upon the work or to employ sufficient force to complete this contract within the time specified, that, upon the report of said fact to the board of public works, said board may at once take possession of the work and employ sufficient force under a competent foreman to complete the work within the time above specified, or as soon as may be, and the cost of such work shall be paid by the said J. B. Smith & Co.

It being further understood and agreed that the cost of said improvement is assessable against private property, as provided by the ordinances of said city, and that the duty and liability of the city to said J. B. Smith & Co., or to any person claiming under them, shall be confined to its power to impose said assessments and deliver the assessment certificates to said J. B. Smith & Co., or to the persons entitled thereto.

It is further agreed that the board of public works or city engineer may cut into or tear down any work that they may feel
19 satisfied has not been done properly and in accordance with this contract, and if it is ascertained that such work has not been done properly and faithfully executed, the said J. B. Smith & Co. shall pay all the costs of tearing down and cutting into; and for reconstruction. But if said work shall have been properly done in the first place, such expense shall be paid by the city.

It is further agreed that the contractors shall be liable for all injury to persons or property caused by the negligence, mismanagement or fault of themselves or either of them or any of their agents or employés while engaged in the construction of said work, and should the city be sued therefor the contractors or their agents shall be notified of said suit, and thereupon it shall be the duty of the said contractors to defend or settle the same; and should judgment go against the city in such case the city shall recover the amount

with all costs from said contractors and the sureties on their bond shall be jointly liable with them, and the record of said judgment against the city shall be conclusive evidence in the case to entitle the city to recover against said contractors; and the right of action shall accrue to the city as soon as judgment shall be rendered, whether the city shall have paid it or not.

The said J. B. Smith & Co. hereby agree and undertake to perform said work in accordance with the plans and specifications at the following price, to wit: one dollar and sixty cents per square yard ($1.60), which price shall cover the cost of the entire work, and said cost is to be assessed, as provided by ordinances of said city, against the private property fronting or abutting on the street or streets upon which said improvement is made, and said assessment shall be payable within the time and in the manner as provided by an ordinance of the city relating to making contracts for paving and curbing streets and alleys, and the construction of sewers, and providing for the manner of making and collecting assessments and issuing certificates for the payment thereof, passed February 22nd, 1889.

And it is further agreed that said assessment certificates shall be received by said J. B. Smith & Co., in full payment and compensation for all work done by them under this contract and without recourse to the city of Des Moines.

And it is hereby further agreed between the parties to this contract that the said city of Des Moines shall not be liable in any manner to the said J. B. Smith & Co. for any extras of any kind or nature whatsoever, or for any damages to the said J. B. Smith & Co., which may be caused by their coming in contact with any rock, water, sand, or any other unforeseen material. It being understood that the contract price herein specified is to be in full payment regardless of any cost or expense that the said J. B. Smith & Co. may be put to on account of the performance of said work.

It is expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city and that the water pipes be put in said street before the work shall be commenced by the said J. B. Smith & Co.

In witness whereof, we have hereunto signed our names this 15th day of March, A. D. 1892.

R. S. FINKBINE,
R. L. CHASE,
Board of Public Works.
J. B. SMITH & CO.,
78 *La Salle St., Chicago, Ill.*

Endorsed on contract: "Approved by city council April 15, 1892. R. B. Dennis, clerk."

That on June 6, 1894, plaintiff amended his petition by leave of court as follows:

Comes now the plaintiff and for a second amendment to his petition as heretofore amended, states:

That plaintiff is informed and believes, and so alleges the fact to be, that the paving certificates referred to in his original petition and in the amendment thereto, for paving done upon said East Grand avenue opposite the lots owned by plaintiff, under the contract referred to in said petition and amendment, and now owned and held by the Des Moines Brick Manufacturing Company, a corporation organized under the laws of Iowa, with its principal place of business at the city of Des Moines, Polk county, Iowa. Plaintiff therefore makes the said Des Moines Brick Manufacturing Company a party defendant to this suit and alleges as against said defendant all the matters heretofore set out in his original petition and in the first amendment thereto, alleging said matters as against the defendant The Des Moines Brick Manufacturing Company with the same effect as against the original defendants to this suit.

And for relief as against the said Des Moines Brick Manufacturing Company plaintiff prays that each and all of the certificates for paving issued against the property of this plaintiff, described in his original petition, may be canceled and declared to be null and void and be no lien upon or against the lots of this plaintiff described in his said petition; and plaintiff further prays for the relief claimed in his said original petition as amended.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

(Duly verified.)

21 That original notice in due form was served on each of said defendants, and that they appeared and pleaded as hereinafter set out.

On June 2, 1894, the defendants, City of Des Moines, and C. H. Dilworth, county treasurer, filed their demurrer as follows:

Come now the defendants, The City of Des Moines and C. H. Dilworth, treasurer, and demur to the petition of the plaintiff filed in this case and to the amendment thereto, on the following grounds, to wit: That the facts stated in said petition and the amendment thereto do not constitute a cause of action or entitle the plaintiff to the relief demanded, or to any relief whatever.

J. K. MACOMBER,
City Solicitor.

That on October 16, 1894, said defendants filed an answer; but that on final hearing said answer was by consent withdrawn and the cause submitted, so far as said defendants are concerned, upon their demurrer to the petition as amended.

On September 10, 1894, the Des Moines Brick Manufacturing Company filed its answer and counter-claim as follows:

Division first.

Comes now defendant, Des Moines Brick Manufacturing Company, and for answer to the plaintiff's petition on file herein, says:

That it admits that plaintiff is and has been at all times since 1888 the owner of the real property described in paragraph 1 of the petition. Admits that said Central Park was platted in the year 1886 and was not then within the corporate limits of the city of Des Moines, and alleges that from about the year 1886 until it became a part of the city of Des Moines the said Central Park and all of said Grand avenue and the property abutting thereon from Twenty-second street to the fair grounds were within the corporate limits of the incorporated town of Grant Park. Admits and alleges that on or about the first day of April, A. D. 1890, said territory became a part of the city of Des Moines and the corporate boundaries of said city became extended so as to include the whole of said territory. And for further answer in respect to jurisdiction of the city of Des Moines over said territory defendant refers to the second division of this answer and makes the same a part hereof as fully as if set out at length herein. But defendant says that plaintiff cannot
22 in this action question the legality of the annexation of said territory to said city, or question the jurisdiction of the said city over said territory.

Admits that there was assessed against said premises on or about the 12th day of June, 1893, the proportion of the cost of paving East Grand avenue assessable against said property, to wit: the sum of one hundred and forty-eight and $\frac{80}{100}$ dollars against each of said lots, and in the aggregate the sum of eight thousand nine hundred and twenty-eight dollars; and for further answer in respect to said paving and the assessment of the cost thereof defendant refers to its counter-claim herein and makes the same a part thereof as fully as if set out at length herein. That plaintiff did not at the time or place provided by law appear or file objections to said assessment and cannot object thereto on this proceeding.

Defendant denies each and every other allegation in the petition.

Division second.

Defendant for a further answer herein to so much of the petition as attacks the jurisdiction of the city of Des Moines over the territory in question, says:

That the defendant City of Des Moines is one of the cities whose boundaries were extended by chapter 1, Acts Twenty-third General Assembly of Iowa. That within the boundaries of said city as extended was included the territory theretofore in the city of North Des Moines and in the incorporated towns of University Place, Greenwood Park, Sevastopol, Gilbert, Easton Place, Capital Park and Grant Park and other territory not theretofore incorporated. That plaintiff's said property and that part of East Grand avenue east of Twenty-second street were within said incorporated town of Grant Park. That prior to the 15th of March, 1890, the inhabitants of the city of Des Moines and of said suburban city and towns had signified their desire to be incorporated into one municipality, and in one an election was held, in some resolutions were adopted by the council, in some resolutions were adopted by the citizens at public meetings, in some petitions were signed, and in all the

inhabitants had signified their desire for a consolidation of said several cities and towns under one municipal government. That on the first Monday in April, 1890, 1892 and 1894 municipal elections were held for the election of city officers for the enlarged city at which all the electors residing within the boundaries of the enlarged city participated. That the city officers elected at said election in the year 1890 entered into their respective offices on the third Monday in April, 1890, and on said day all the officers of the several cities and towns within the territory of said enlarged city retired from their several offices and delivered to the said
23 officers of the city of Des Moines all the books, records and property of said cities and towns. That on the 15th day of July, 1890, the city council of the city of Des Moines adopted an ordinance defining the boundaries of said city as enlarged, and asserting jurisdiction over all of said territory, a copy of which ordinance is attached to the petition and is now made a part of this answer. That since said third Monday in April, 1890, the city of Des Moines and its officers have undisturbed exercised complete jurisdiction over all of the territory in said enlarged city including the territory mentioned in the petition and all other territory, both original and annexed, and among other things have been done the following: Taxes have been laid and collected, streets have been improved by grading, curbing and paving, and sewers constructed and the cost of curbing, paving and sewering assessed upon abutting property; sidewalks have been constructed, repaired and cleaned and the cost assessed upon abutting property, water mains have been laid and water rents paid, highways have been improved and bridges built, ordinances and board of health regulations have been enacted and enforced and general police jurisdiction exercised, and in general all the corporate powers of a city of the first class have been exercised over all of said territory included within the enlarged city. That the corporate capacity and jurisdiction of said city within all of said territory has been recognized and acquiesced in by the inhabitants of said territory, by the State and county officers and by the courts and legislature, and among other acts of the legislature so recognizing said city and its jurisdiction over all of said territory are chapters 3, 25 and 125, Acts Twenty-third Assembly; chapters 1, 2 and 144, Acts Twenty-fourth General Assembly, and chapters 170 and 179, Acts Twenty-fifth General Assembly, all of which relate to matters in whole or in part within the annexed territory of the city of Des Moines or to acts done by said city by virtue of powers derived by or through the extension of its limits. That plaintiff has by paying without objection city taxes and special assessments levied by the city of Des Moines upon his said property, long recognized and acquiesced in the jurisdiction of said city over said annexed territory.

That on the 10th day of April, 1894, prior to the commencement of this suit, was passed chapter 12, Acts Twenty-fifth General Assembly, and at said date the city of Des Moines was exercising undisturbed jurisdiction within all of the annexed territory and

within the boundaries defined by said ordinance hereinbefore referred to.

That by reason of the said matters, plaintiff is estopped to deny the jurisdiction of the city of Des Moines over said territory or its jurisdiction to make said assessment complained of, and that plaintiff cannot, in this proceeding, attack or question the corporate
24 character or capacity of the city of Des Moines or its jurisdiction over said territory or its jurisdiction to levy said special assessment.

Division third.

The defendant, The Des Moines Brick Manufacturing Company, for further answer herein and by way of a counter-claim against the plaintiff, C. P. Dewey, says:

Paragraph 1. That this defendant, The Des Moines Brick Manufacturing Company, is a corporation organized under the laws of the State of Iowa, and that the defendant, The City of Des Moines, is a municipal corporation and a city of the first class, organized under the laws of the State of Iowa.

Par. 2. That on the 11th day of May, 1891, and the 1st day of February, 1892, the city council of the city of Des Moines adopted resolutions ordering that East Grand avenue, from East Eighteenth street to the fair grounds or East Thirtieth street, be improved by paving with brick according to the plans and specifications on file in the office of the board of public works of said city.

Par. 3. That on the 15th day of March, A. D. 1892, a contract was entered into by said city of Des Moines, through its board of public works, with J. B. Smith & Co., whereby the said city contracted with the said J. B. Smith & Co., for the paving of said street, and agreed in payment of the cost of said improvement to assess said cost against the abutting property, and to issue and deliver to said J. B. Smith & Co., or their assigns, assessment certificates as provided by law and the ordinances of said city. That said contract was afterward approved by the city council of said city of Des Moines.

Par. 4. That thereafter, the said improvement having been completed by said J. B. Smith & Co., and accepted by the city engineer and board of public works, the board of assessors of said city and the council did, on or about the 19th day of May, 1893, duly assess against the following-described property, to wit: lots numbered 17 to 76, both inclusive, in Central Park, and being the same premises described in paragraph 1 of the plaintiff's petition, and against plaintiff C. P. Dewey, the owner thereof, the sum of one hundred forty-eight and eighty one-hundredths dollars, against each of said lots, and in the aggregate the sum of eight thousand nine hundred twenty-eight dollars, being the *pro rata* share of the cost of said paving done by said J. B. Smith & Co., as aforesaid assessed against said premises, which said assessment was, on the 12th day of June, A. D. 1893, approved and confirmed by resolution adopted by the city council of said city.

Par. 5. That thereupon the said city of Des Moines caused to be

issued and delivered to said J. B. Smith & Co., in payment
25 of the cost of said improvement and in accordance with the terms of said contract hereinbefore referred to, sixty assessment certificates, being one certificate for the sum of $148.80 against each of said several lots. That a copy of one of said assessment certificates is hereto attached, marked Exhibit A and made a part hereof, and that the other fifty-nine of said several assessment certificates are each the same as said Exhibit A in all respects except the description of the lot included therein. That this defendant, The Des Moines Brick Manufacturing Company, is now the owner and holder of all of said several assessment certificates.

Par. 6. That by virtue of the laws of the State of Iowa, and the said assessment and said certificates, the plaintiff, C. P. Dewey, is personally liable and indebted to this defendant in the aggregate sum called for in said certificate, to wit: the sum of $8,928.00, with interest thereon from the date of said assessment, May 19, 1893, at the rate of ten per cent. per annum until paid, and the further sum of five per cent. upon the amount of said certificates and interest as aforesaid to defray the expenses of collection, and for costs of suit, and that said several sums of money are now justly due and owing from plaintiff to this defendant, and no part thereof has been paid.

Par. 7. That by virtue of the laws of the State of Iowa and said assessment and said certificates, this defendant, The Des Moines Brick Manufacturing Company, has the first and paramount lien for the said several sums mentioned in paragraphs 5 and 6 of this division, together with the costs and accruing costs upon the real estate hereinbefore described, and being the same property described in paragraph 1 of plaintiff's petition, being for the amount of one of said assessment certificates with interest and costs of collection thereon, and for a *pro rata* amount of the other costs and disbursements upon each of the said several lots or pieces of real estate. That said liens attached to said property from the commencement of the work of paving of said street, to wit, from the — day of August, 1892, and is in law superior to all liens upon said premises.

Par. 8. That plaintiff upon the issuance of said certificates and the making of said assessment, failed to avail himself of the right to pay said assessment in installments, and failed to promise or agree in writing endorsed upon said certificates that in consideration of having the right to pay said assessment in installments he would not make any objection of illegality or irregularity as to said assessment, and would pay the same with interest. That by reason of said failure plaintiff never acquired the right to pay said assessment in the installments, and is and was required to pay the same in full when made, and that part of said several certificates which
26 relates to payment in installments never became binding or operative. That the amount of said assessment with interest and expenses of collection, costs and accruing costs as hereinbefore stated, became due and payable when assessed and the first

lien on said premises from the date of said assessment, and no part thereof has been paid.

Wherefore defendant, The Des Moines Brick Manufacturing Company, demands judgment against plaintiff, C. P. Dewey, for said sum of eight thousand nine hundred and twenty-eight dollars ($8,928), with interest thereon from the 19th day of May, A. D. 1893, at the rate of ten per cent. per annum until paid, and for the further sum of five per cent. upon the whole amount of principal and interest to defray the expenses of collection, and for costs and accruing costs; that defendant's liens upon said several lots be established as of the date of the commencement of said work, to wit, the — day of August, 1892, and that said liens be adjudged to be superior and paramount to the right, title and interest of the plaintiff in and to said real estate, and that the right, title and interest of plaintiff in and to the said real estate be foreclosed and barred; that said real estate be sold to satisfy the said judgment and interest, and expenses of collection and costs and accruing costs, and that for any balance thereof remaining unsatisfied on said sale defendant may have a general execution against the property, rights and credits of the plaintiff; and defendant asks for all such other and further relief as in equity it may be entitled, and thus will ever pray.

GUERNSEY & BAILY,
Attorneys for Defendant, The Des Moines Brick Manufacturing Company.

(Duly verified.)

EXHIBIT A TO COUNTER-CLAIM.

Number 884. Dollars, 148.80.

UNITED STATES OF AMERICA, *The City of Des Moines.*

Assessment Certificate.

STATE OF IOWA, *County of Polk.*

It is hereby certified, that the city council of the city of Des Moines in accordance with the law, and the ordinances of said city, providing for the improvement of streets and alleys by sewering, paving and macadamizing the same, did on the 1st day of February, 1892, order by resolution that East Grand avenue from Twenty-second street to Thirty-eighth street, be improved by paving;
27 that afterwards, to wit, on the 15th day of April, 1892, a contract was entered into by the city of Des Moines, through the board of public works of said city, and J. B. Smith & Co., and approved by the city council, in which the said J. B. Smith & Co. agreed to make said improvement; that the said improvement having been completed by the said J. B. Smith & Co. and accepted by the city engineer and board of public works, the board of assessors of said city did on the 19th day of May, 1893, duly assess against the following property, to wit: lot 44, Central Park, and against

Chas. P. Dewey, the owner thereof, the sum of ($148.80) one hundred and forty-eight and $\frac{80}{100}$ dollars, the same being for the *pro rata* share of the cost of said paving assessed against said property, to be paid by the owner thereof. That said assessment was fully approved by the city council and is authorized by the laws of the State of Iowa and is payable immediately unless said Chas. P. Dewey signs the agreement endorsed hereon, in which event it is payable as follows, to wit: one-seventh of said sum, with interest on the whole amount at six per cent., at the first semi-annual payment of taxes next succeeding the aforesaid date of this assessment, one-seventh in one year, one-seventh in two years, one-seventh in three years, one-seventh in four years, one-seventh in five years, and one-seventh in six years from the date of said assessment, with six per cent. interest per annum, payable annually, upon the whole amount remaining unpaid. The amount of said assessment, or any yearly payment thereof, with interest, may be paid at any time to the county treasurer, in the manner and upon the terms provided by the laws of Iowa. No payment shall be made to the holder until the certificate, coupon or coupons so paid are surrendered to the county treasurer. When the last installment is paid this assessment certificate with six per cent. interest from the date of last payment shall represent the last installment, and shall be surrendered in like manner as is above provided for the coupons, and like entries be made and receipts given.

That a plat and schedule showing said assessment have been duly filed in the office of the city clerk, and a duly certified copy thereof delivered to the county auditor, as provided by law, and said assessment will be collected and paid over by the county treasurer in the manner authorized by the laws of said State of Iowa. And the said city of Des Moines hereby transfers to J. B. Smith & Co. or bearer, or their assigns, all its right and interest to, in and with respect to said improvement, and J. B. Smith & Co. or bearer, or their assigns, are hereby authorized to receive, sue for and collect or have collected said assessments by or through any of the methods provided by law for the collection of assessment for such improvements. It is hereby further certified that all the provisions of the law
28 and ordinances of said city respecting the issuance of this certificate have been fully complied with.

In witness whereof, said city has caused these presents to be signed by its mayor and countersigned by the city clerk this 12th day of June, 1893.

[SEAL.] C. C. LANE, *Mayor.*

Countersigned:

R. B. DENNIS, *City Clerk.*

(The plaintiff, Chas. P. Dewey, never signed the agreement or waiver endorsed on the back of said certificate.)

That on October 1, 1894, the plaintiff filed his reply to the counterclaim of the Des Moines Brick Manufacturing Company, as follows:

Comes now the plaintiff, and for reply to the third division of the

answer of the Des Moines Brick Manufacturing Company, being its counter-claim against plaintiff, says:

Paragraph 1. Plaintiff admits the allegations contained in paragraph 1 of said counter-claim.

Par. 2. Answering paragraph 2 of said counter-claim, plaintiff admits that on the dates mentioned therein some action was taken by the city council of said city with reference to paving East Grand avenue, but plaintiff denies that any action was taken on that subject other than what is set out in plaintiff's petition herein.

Par. 3. Answering paragraph 3 of said counter-claim, plaintiff admits that a contract was made by said city with J. B. Smith & Co., a copy of which is attached to the first amendment to plaintiff's petition and marked Exhibit B; but plaintiff denies that any other or different contract was made or entered into by the said parties in respect to said work.

Par. 4. Answering paragraph 4 of said counter-claim, plaintiff admits the allegations therein contained so far as consistent with the petition of the plaintiff and amendments thereto; but so far as inconsistent with the averments of the said petition and amendments plaintiff denies the same.

Par. 5. Answering paragraph 5 of said counter claim, plaintiff admits the allegations therein contained so far as in harmony with the allegations contained in plaintiff's petition as amended;
29 but so far as the averments in said paragraph conflict with the petition and amendments, plaintiff denies the same; except that plaintiff admits that the said Des Moines Brick Manufacturing Company is the holder of said paving certificates.

Par. 6. Answering paragraph 6 of said counter-claim, plaintiff denies each and every allegation therein contained.

Par. 7. Answering paragraph 7 of said counter-claim, plaintiff denies each and every allegation therein contained.

Par. 8. Answering paragraph 8 of said counter-claim, plaintiff admits that he did not sign the waivers upon said assessment certificates, and denies that he had any knowledge or information that said assessments had been levied or certificates issued; as to the other averments in said paragraph 8, plaintiff denies each and all of said allegations.

Par. 9. Further answering said counter-claim as a whole, and each and every allegation therein contained, plaintiff states: That he reaffirms, and makes part of this paragraph, the allegations contained in paragraphs 1, 3, 5, 6, 6*a*, 6*b*, 6*c*, 7, and 8, and each of said paragraphs, as fully set forth in plaintiff's petition and the first amendment thereto; and plaintiff makes each and all of the allegations contained in said several paragraphs of his petition and amendment a part of this paragraph the same as if specifically and in detail set out and averred herein; and plaintiff prays that the averments of this paragraph, which include substantially all the averments of his original petition herein, may be taken to be the foundation for affirmative relief as against the said Des Moines Brick Manufacturing Company and as grounds for the cancellation of said several paving certificates referred to in said counter-claim.

Wherefore plaintiff prays that the assessments made upon his property hereinbefore described, and the paving certificates issued against said property by said city of Des Moines, may be annulled and declared to be illegal and void, and that the said counter-claim of the said Des Moines Brick Manufacturing Company may be dismissed at its costs, and that plaintiff have the relief prayed for in his original petition.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.

(Duly verified.)

30 That on October 10, 1894, the Des Moines Brick Manufacturing Company, filed its motion to strike from the reply, as follows:

Division I.

Comes now defendant, Des Moines Brick Manufacturing Company, and moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the whole of paragraph 9 thereof, for the following reasons:

1. That the allegations thereof are incompetent, irrelevant and immaterial.

2. That the allegations thereof do not constitute a defense or any part of a defense to said counter-claim or any part thereof.

3. That the allegations thereof are the statement of mere conclusions and not the statement of any fact or facts.

4. That plaintiff cannot in this action attack or question the corporate character, boundaries or jurisdiction of the city of Des Moines.

5. That whatever defects or irregularities existed in the organization of the city of Des Moines, or in the extension of its boundaries, or in the annexation of said territory thereto, has been cured by lapse of time and public recognition and acquiescence long before the commencement of this action.

6. That whatever defects or irregularities in the organization of the city of Des Moines, or in the extension of its boundaries, or the annexation of said territory thereto, had been cured, and said organization, extension of boundaries and annexation of territory ratified and confirmed by the provisions of chapter 12, Acts of the Twenty-fifth General Assembly, long before the commencement of this action.

7. That said chapter 1, Acts of the Twenty-third General Assembly, does not in any way contravene or violate any of the provisions of the constitution.

8. That the city having been in fact and without objection exercising jurisdiction over said territory, the said assessment cannot be defeated because of any irregularities or defects in the proceedings under which said city obtained or exercised such jurisdiction.

9. That the plaintiff, having failed to appear and object to said improvement or said assessment at the time and in the manner and at the place provided by law, cannot now be heard to complain thereof in this proceeding.

10. That said improvement having been completed and plaintiff

having failed to pay or offer to pay any part of the cost thereof, he cannot in this proceeding be heard to complain thereof.

31 11. That the determination of the city council of the necessity for said improvement is final and cannot be inquired into in this proceeding.

12. That said improvement having been accepted by the city engineer and board of public works, their determination is final and conclusive upon plaintiff and cannot be inquired into in this action.

13. That the record shows that the notice for proposals complied with the requirements of the statute governing said matter.

14. That the irregularities and defects complained of in the proceedings upon which said assessment is founded are not sufficient to prevent the city from making a valid or binding assessment.

15. That the allegations of fraud or collusion either in respect to the ordering of said improvement or the determination of the necessity therefor are incompetent, irrelevant and immaterial and the statement of mere conclusions and not the statement of any facts.

16. That the allegations of fraud or collusion either in respect to the execution of the work or the acceptance thereof are incompetent, irrelevant and immaterial and the statement of mere conclusions and not the statement of any facts.

Division II.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all that paragraph 1 of the petition as incorporated by reference in said reply beginning with the words "but that by the provisions of chapter 1" and ending with said paragraph.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division III.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: the words "which tax plaintiff has refused to pay claiming the same to be illegal and void for the reasons hereinafter stated" in paragraph 3 of the petition incorporated by reference to said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division IV.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the

32 Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: the words "that said alleged

tax is a cloud upon the title of the real estate of this plaintiff and the personal property of this plaintiff is liable to *to* be illegally seized for the payment of said alleged tax" in paragraph 4 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division V.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 5 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VI.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VII.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6*a* of the petition incorporated by reference to said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division VIII.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6*b* of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

33 Division IX.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 6*c* of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division X.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company the following part of paragraph 9 thereof, viz: all of paragraph 7 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

Division XI.

Defendant, Des Moines Brick Manufacturing Company, moves the court to strike out from the reply to the counter-claim of the Des Moines Brick Manufacturing Company, the following part of paragraph 9 thereof, viz: all of paragraph 8 of the petition incorporated by reference in said reply.

And shows to the court as grounds therefor each and all of the reasons assigned in division 1 of this motion.

GUERNSEY & BAILY,
Attorneys for D. M. Brick Mfg. Co.

The following stipulation was filed in said cause:

It is hereby stipulated and agreed between the parties to the above-entitled suit:

1. That plaintiff qualifies and amends his petition and reply herein as follows: That in paragraph 6 of the petition, in the first sentence of said paragraph, the words, "in law" may be inserted after the word "were," so that the sentence will read: "That the resolutions to pave said street and the order directing said work to be done were in law oppressive, collusive, fraudulent and void." The words "in law" may also be inserted in the sentences near the middle and at the close of said paragraph 6 to qualify the words "in collusion with said society and its directors," and the words "fraudulently and collusively and oppressively." The said
34 words "in law" may also be inserted to qualify the allegations of fraud and collusion in paragraph 6c of the petition. The plaintiff concedes that the city council believed it had the power to improve said street for the purpose and under the circumstances alleged; and plaintiff will not claim, by the allegations made in the petition or reply, actual or intentional fraud or collusion on the part of the city council or board of public works, but only fraud and collusion in law as shown by the facts set out.

And plaintiff qualifies paragraph 9 of his reply, making the allegations of the petition a part of such reply, by reference to the foregoing amendments to and qualifications of the allegations of the said petition.

2. It is further stipulated and agreed that the motion of the Des Moines Brick Manufacturing Company to strike from the reply shall be considered as applying to the petition and the reply as above amended and qualified, and as if said motion had been filed after the above changes in the petition and reply were made; and the

said motion to strike shall be given effect as a demurrer to the paragraphs and portions of paragraphs assailed by said motion, as amended and qualified by this stipulation.

Dated this — day of January, 1895.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff.
J. K. MACOMBER AND
GUERNSEY & BAILY,
Attorneys for Defendants.

The final

Decree

was as follows:

Now, to wit, on this 18th day of November, 1895, being a day of the regular November, 1895, term of this court, this cause coming on to be heard, Gatch, Connor & Weaver appearing for plaintiff, J. K. Macomber for the defendants, City of Des Moines and C. H. Dilworth, treasurer, and Guernsey & Baily for defendant, Des Moines Brick Manufacturing Company, and the parties having filed herein a written stipulation, thereupon by consent of parties the defendants, City of Des Moines and C. H. Dilworth, county treasurer, withdrew their answer and refiled herein their demurrer to the petition as amended and as affected by said stipulation, and the court having heard the arguments of counsel, and being fully advised in the premises, sustained said demurrer, to which ruling plaintiff excepted and elected to stand upon his petition, and refused to plead further. It is therefore considered, adjudged and decreed that as to defendants City of Des Moines and C. H. Dilworth, county treasurer, the plaintiff's petition be and it is dismissed on the merits, and that said defendants have and recover from plaintiff the costs of this action as taxed by the clerk, and that execution issue therefor. To all of which plaintiff at the time duly excepted.

Thereupon this cause further came on to be heard on the motion of defendant, Des Moines Brick Manufacturing Company, to strike from plaintiff's reply to the answer and counter-claim of said Des Moines Brick Manufacturing Company, setting out in substance the same facts alleged in plaintiff's petition as amended, and the court having heard the arguments of counsel and being fully advised in the premises sustained said motion. To which ruling plaintiff at that time duly excepted and elected to stand upon his pleadings and refused to plead further.

Afterward on said day this cause further came on to be heard and tried upon the counter-claim of defendant, Des Moines Brick Manufacturing Company, when said defendant offered in evidence the sixty special assessment certificates described in defendant's answer and counter-claim and sued on herein, to which plaintiff objected on the grounds alleged in his petition and reply. Thereupon the court having inspected the pleadings, heard the evidence and arguments of counsel and being fully advised in the premises, finds that the allegations of the answer and counter-claim of defendant, Des Moines Brick Manufacturing Company, are true and that the equities

are with said defendant and that it is entitled to judgment and decree as prayed against each of the several lots described in the answer and counter-claim for the sum of one hundred and forty-eight and $\frac{80}{100}$ dollars ($148.80) with interest thereon from the 12th day of June, 1893, at the rate of ten per cent. per annum and to a collection fee equal to five per cent. of the said sums, and that said defendant is entitled to judgment against plaintiff personally for the aggregate amount of said several sums, to wit: eighty-nine hundred and twenty-eight dollars ($8,928), the amount of said several assessments, and the further sum of twenty-one hundred seventy-two and $\frac{48}{100}$ dollars ($2,172.48), being interest thereon from the 12th day of June, 1893, at the rate of ten per cent. per annum, and the further sum of five hundred fifty-five and $\frac{2}{100}$ dollars ($555.02) collection fee, together with interest thereon from the 18th of November, 1895, and the costs of this action, to all of which plaintiff excepted.

It is therefore considered, adjudged and decreed that defendant, Des Moines Brick Manufacturing Company, have and recover from the plaintiff, C. P. Dewey, the sum of eleven thousand six
36 hundred fifty-five and $\frac{50}{100}$ dollars ($11,655.50) with interest thereon from the 18th day of November, 1895 (being the amount of said special assessments with interest from the date of the assessment at the rate of ten per cent. per annum and a collection fee equal to five per cent. of said assessments and interest), and in addition thereto the costs of this action as taxed by the clerk.

It is further considered, adjudged and decreed that by virtue of said assessment and the judgment thereon defendant, Des Moines Brick Manufacturing Company, has a first and primary lien upon each of said several lots described in said answer and counter-claim and in said several special assessment certificates, to wit: lots No. seventeen (17) to seventy-six (76), both inclusive, in Central Park, now included in and a part of the city of Des Moines, being for one-sixtieth of the total amount of said assessments and interest, collection fee and costs, to wit: for the sum of one hundred ninety-four and $\frac{26}{100}$ dollars ($194.26) with interest from the 18th day of November, 1895, and costs upon each of said lots, and the said liens are hereby enforced and foreclosed upon said real property against said plaintiff.

It is further ordered, adjudged and decreed that a special execution issue for the sale of said real property or so much thereof as may be necessary to satisfy the foregoing judgment and interest and costs and accruing costs; that the said lots be offered and sold separately and that upon the expiration of one year from the date of such sale the equity of redemption of plaintiff in said real property be forever barred, and upon the execution of the sheriff's deed the title thereto vest absolutely in the purchaser at the said sale or his assignee.

It is further ordered and adjudged that for any balance of said judgment, interest or costs remaining unsatisfied after return of said special execution, a general execution issue against the plaintiff.

To all of which and each part thereof plaintiff at the time duly excepted.

Thereafter, on November 23, A. D. 1895, the plaintiff, in due form of law, perfected his appeal from said decree, and from each separate provision thereof, and served notice of appeal in proper form to the supreme court on each of said defendants, and on the clerk of the district court of Polk county, and secured to said clerk his fees for transcript, and filed said notice of appeal, with proof of service thereof duly made and accepted by said clerk and by each of
37 said defendants, in said clerk's office, on the 25th day of November, A. D. 1895.

Assignment of Errors.

And this appellant avers that the district court erred, and that such error is manifest upon the face of the record, to all of which appellant duly excepted, in this:

1. The court erred in sustaining the demurrer of the city of Des Moines and C. H. Dilworth, treasurer, to plaintiff's petition as amended, upon the alleged ground that no cause of action was stated therein, when as matter of law it was shown by said petition as amended that said special assessment and the contract for the paving of the street were illegal on three separate grounds, to wit:

First. The city council had no power to pave the street in question at the expense of abutting property and its owners, including the plaintiff herein and his said lots, solely for the benefit and convenience of the State Fair Association and its directors, and when such paving was not required for the health or convenience of the residents of said street or the public generally; and said improvement and special assessments under the circumstances alleged and admitted were fraudulent, oppressive and void.

Second. The contract for the paving of said street and the special assessment to pay for such work were illegal and void for the further reason that the published proposals to bidders for said work were not in substantial compliance with the statute in the particulars specified in paragraphs 6*a* and 6*b* of the petition as amended; and said published proposals to bidders failed to state the extent of the work, when the work should be begun, or at what time such proposals would be acted upon, as the statute specifically re-
38 quired as conditions precedent to the making of a valid contract for paving streets; and for that reason also the assessments were illegal.

Third. That the alleged annexation to the city of Des Moines of the territory which included the lots of plaintiff, under chapter 1, Acts Twenty-third General Assembly (1890), was illegal and void, said statute being a local and special law and in contravention of the constitution of Iowa, as alleged in paragraphs 7 and 8 of plaintiff's petition; and said city of Des Moines had no jurisdiction to improve said street or to levy the special assessment in question, for that reason on plaintiff's said lots.

2. The court erred in sustaining the motion of the Des Moines Brick Manufacturing Company to strike from plaintiff's reply to its counter-claim the matters therein alleged, which included substan-

tially all the allegations of the petition as amended; for the reason that said city of Des Moines had no power to pave said street, or jurisdiction over it, and the contract and assessment were illegal and void, upon the grounds and by reason of the matters specified in the first assignment of errors herein under the specifications "first," "second" and "third," which specifications are also made part of and included in this second assignment of errors.

3. The court erred in rendering a decree in favor of said Des Moines Brick Manufacturing Company for the amount of said special assessments, and making the same a lien on plaintiff's said lots, for each and all of the reasons set out and specified in the first and second assignments of error setting forth the invalidity of said contract and tax or assessment, and also the want of jurisdiction of the city of Des Moines to improve said street at the cost of the owners of abutting property, including this plaintiff. Said specifications designated "first," "second" and "third," are made part of this assignment of errors.

39 & 40 4. The court erred in holding and deciding that plaintiff was personally liable to said Des Moines Brick Manufacturing Company for so much of said special tax or assessment as could not or would not be realized by a sale of the sixty lots in question on special execution, and in ordering and adjudging that a general execution should issue against plaintiff and in favor of said Des Moines Brick Manufacturing Company for the balance of such tax or assessment; and further that, as plaintiff was at all times a non-resident of the State of Iowa and had no personal notice or knowledge of the assessment proceedings, that the imposition of a personal liability against him, in excess of the value of all the lots, was not due process of law and was in contravention of the provisions on that subject of the fourteenth amendment to the Constitution of the United States, as well as in contravention of the provisions of the constitution of the State of Iowa on the same subject.

5. The court erred in holding and adjudging that plaintiff or his property was liable to said Des Moines Brick Manufacturing Company for ten per cent. interest and five per cent. collection fee, without notice to plaintiff of the issuance of said paving certificates and opportunity afforded him to sign the waiver and obtain the statutory period to pay such assessment.

Notice of Oral Argument.

Notice is hereby given that counsel for appellant will argue this cause orally in the supreme court, as specified by the rules thereof.

GATCH, CONNOR & WEAVER,
Attorneys for Plaintiff and Appellant.

41 And said cause was submitted to said supreme court on the foregoing record at the October term thereof, 1896, and on the 7th day of April, 1897, said court filed its opinion (decision) in writing, the same being in the words and figures, following, to wit:

In the Supreme Court of Iowa.

Filed April 7, 1897.

C. P. DEWEY, Appellant,
vs.
CITY OF DES MOINES, C. H. DILLWORTH, Treasurer of Polk County, and DES MOINES BRICK MANUFACTURING COMPANY, Appellees.

Appeal from Polk district court, Hon. C. P. Holmes, judge.

This is an action in equity begun in April, 1894, to set aside a special assessment for paving East Grand avenue, in the city of Des Moines, between Eighteenth street on the west and the State fair grounds on the east, upon which street and between the points named plaintiff's lots abut. Certificates were issued to the contractors doing the work and were by them assigned to the defendant The
42 Des Moines Brick Manufacturing Company.

The latter company filed an answer and a counter-claim against plaintiff and the lots in question to foreclose the certificates. Plaintiff replied to the counter-claim, presenting the same facts which were pleaded in the petition. The brick company filed a motion to strike one paragraph of the reply.

The parties then agreed that said motion should be treated as a demurrer and considered as referring also to the portions of the petition which are embodied in the paragraph of the reply assailed. It was also agreed that the allegations of fraud in plaintiff's pleadings should be so changed as to eliminate any charge of fraud in fact. The case was tried and a decree entered against the plaintiff, and he appeals.

Gatch, Connor & Weaver, for appellant.

Guernsey & Baily, for appellee The Des Moines Brick Manufacturing Company.

J. K. Macomber, for the City of Des Moines and Dillworth.

KINNE, *C. J.*:

1. We proceed to a consideration of the questions involved
43 in this appeal in the order in which they are presented by the appellant. The first claim is that the city had no power to pave the street in question at the expense of the abutting property-owners, and that the improvement and special assessments were fraudulent, oppressive, and void. It is to be remembered that under the agreement of the parties plaintiff does not claim that there was any actual or intentional fraud or collusion on the part of the city council or board of public works, but only fraud and collusion in law, as shown by the facts pleaded.

Counsel elaborately argue this question, and present many authorities in support of their claim. We cannot consider in this opinion in detail all of the cases cited. We can only determine from an examination of them what the law applicable to the question is and announce it, with a reference to the cases and a brief statement of the reasons for our holding.

The power of the city council to determine whether such improvements shall be made is undoubted, indeed counsel do not dispute it; but they insist that the exercise of such power is subject to review by the courts. The rule of law is that where a municipal body, like a city council, is invested with power to make im-
44 provements like those in controversy in this action, the necessity for making such improvements is a matter for the exclusive determination of such body, and when such body acts within the authority given, and its determination is fairly made—that is, without fraud or oppression—it cannot be interfered with by the courts.

City of Muscatine *vs.* Railway Co., 88 Iowa, 291; 55 N. W. Rep., 100.
Everett *vs.* City of Council Bluffs, 46 Iowa, 66.
Brewster *vs.* City of Davenport, 51 Iowa, 427; 1 N. W. Rep., 737.
Coates *vs.* City of Dubuque, 68 Iowa, 550; 27 N. W. Rep., 750.
City of Burlington *vs.* Quick, 47 Iowa, 222.
Brown *vs.* Barstow, 87 Iowa, 344; 54 N. W. Rep., 241.
Des Moines Gas Co. *vs.* City of Des Moines, 44 Iowa, 509.
Dillon on Municipal Corporations, section 94.

The question, then, is, Did the body act within the power given, and was its determination to make the improvements fairly made—that is, without fraud or oppression? It is insisted that under the facts disclosed in this record that the council acted fraudulently and oppressively. The facts upon which plaintiff predicates his claim of fraud in law are in substance these: that the improvements were ordered at the instance of the directors of the State Agricultural Society and because they would be of great
45 benefit to said society in holding its annual fairs. It can make no difference as to who instigated the proceedings as to their legality. The question is, as we shall hereafter see, as to the necessity for the improvements. Plaintiff alleges that from the western point where said improvements commence to the extreme eastern point at the fair ground was a distance of over one mile, and that in that entire distance there are no buildings fronting upon said street save four inexpensive houses, and that some of them were not there when the street was ordered paved.

That all of the property-owners on both sides of said street between said points were opposed to said improvements being made at their expense, and that there was no necessity therefor "so far as the property or interests of the persons owning property along the side of the street are concerned."

The necessity for the work must be determined from all of the facts and circumstances and from the public use of the street.

Here was a public street within the limits of a populous city, and it appears from the allegations of the pleadings that it was opened as a public highway by the board of supervisors in 1886 and prior

to the time the territory embracing it was added to the city;
46 that plaintiff's lots were platted and the plat filed in 1886;
that in 1890 this territory became a part of the city, and in 1891 the city council ordered the *the* improvements made; that the street was improved and worked by the proper authorities from 1886 to 1890; that it was used largely by vehicles passing between the main portion of the city and the fair grounds; that it was a dirt road and dusty in dry weather; that large numbers of people visit the fair each year, and this street is and has been the most direct and convenient highway to said grounds for wagons, horses, and cattle, and for persons having them in charge. It fairly appears that this street had been a public thoroughfare ever since it was first opened. How extensively it had been used by the public generally, except at fair times, does not appear. In the absence of allegations of actual or intentional fraud on the part of the council, it clearly appears from the foregoing facts that no improper benefit was contemplated by that body in its action. The only benefit arising from the improvements, aside from that accruing to the abutting lot-owners, was that which would accrue to the general public in having adequate accommodations on and over this street.

Counsel for appellant seem to measure the necessity for
47 these improvements solely by the wants and necessities of
the abutting lot-owners. This is not the true or only test of such necessity; if it was, then it may well be doubted whether half of the streets in the city of Des Moines would ever be paved, curbed, or sewered.

It is a fact known to all men at all conversant with such matters that, as a rule, property-owners object to such improvements because they entail a great expense which must be borne by them, and the benefits arising from them accrue not only to the lot-owners, but likewise to the general public. In the absence of allegations to the contrary it may well be assumed that this street was used by people from the country as a means of access and egress to and from the city. For aught that appears, it was in constant use by citizens. There is no allegation that it was not so used and we are not warranted in saying that it was not because of the allegation that the improvements were unnecessary so far as the abutting lot-owners were concerned. It appears that the property-owners protested against the improvement.

It would seem, therefore, that it must have been ordered after a full hearing and consideration. As we have said, it does not appear
how much this street was used except during fair time, nor
48 does it appear to what extent the territory adjacent to the
street, but not immediately abutting upon it, is settled or occupied, nor whether the people, if any, living within such territory use this street. Now, the use of the street, whether at fair time or at other times, by non-residents is a public use, and in a proper sense just as much for city purposes as its use by people living upon it, or by those living within the territory contiguous to it, or by those who may live in the country and use it in going to and from the business portion of the city. The obligation of the city to

maintain its streets in proper repair is no less to non-residents who may use them than it is to residents of the city. Its liability for an injury by reason of its negligence in keeping the street in repair would be the same in either case. Under all of the facts recited in the petition we discover no reason for saying that the action and determination of the council was not fairly made, nor does it appear that it was made under such circumstances as that it can properly be said that their action was oppressive.

True, it is oppressive in its effect in the sense that all public improvements which involve the expenditure of large sums of money by property-owners are felt to be oppressive, but that is not
49 the oppression which will warrant us in overturning the action of the proper municipal body which has acted within its powers and fairly and without any fraudulent view or intent.

Such burdens, when fairly laid, must be borne, and their necessity is not to be determined alone by their effect upon or the amount of burden thereby cast upon the property-owner.

If in fact such improvements be required for the public good the burden is one necessarily incident to the ownership of property in cities. We have said that the necessity for the improvement is not to be determined alone from its benefit to the abutting lot-owners. We do not consider it necessary to enter into an elaborate discussion of the question as to whether or not a special assessment must be based in part even upon the idea of a benefit to be actually received by the abutting property. It is sufficient to say that it has been repeatedly held by this court that such improvements of streets is a public object which will support such an assessment regardless of the fact of whether or not it is a benefit to the abutting property.

Warren *vs.* Henley, 31 Iowa, 31.

Morrison *vs.* Hershey, 32 Iowa, 271.

Gatch *vs.* City of Des Moines, 63 Iowa, 718; 18 N. W. Rep., 310.

50 City of Muscatine *vs.* Railway Company, 88 Iowa, 291; 55 N. W. Rep., 100.

We regard the law upon this question as settled in this State.

2. It is next contended that the contract for paving the street and the special assessments to pay for said work were illegal and void, for the reason that the published proposals to bidders for said work were not in substantial compliance with the statute, in that said proposals failed to state the extent of the work, when the work should be begun, and at what time said proposals would be acted upon. To determine this question it is necessary to first ascertain what statute was in force at the time the improvements in controversy were ordered and contracted for. Chapter 168, Acts of the 21 G. A., which took effect on April 20, 1886, prescribed the manner in which contracts for paving should be let, and provided, among other things, that *that* there should be an advertisement for bids, which should contain "a description of the kind and amount of work to be done and material to be furnished as nearly accurate as practicable."

Chapter 1 of the Acts of the 22 G. A. provided for the creation of a board of public works and authorized them to make contracts for public improvements, and section five of the act provided
51 that the board shall advertise for bids when the amount of the work is in excess of $200.00 and expressly provides that the proposals shall state the amount and different kinds of material to be furnished and kind of improvement and the time and conditions upon which bids shall be received; also that it shall not be necessary before proposals are published or bids received to determine specifically the kind of material to be used. It is also provided that all contracts made by the board shall be subject to the approval of the city council. This law went into effect on July 4, 1888. Prior to the taking effect of the act creating the board of public works chapter five of the Acts of the 22 G. A. took effect (April 21, 1888), which amended chapter 168, Acts of the 21 G. A., and provided that the public advertisement for bids should state the kind and amount of work to be done and specify the different kinds of material for which bids should be received. April 18, 1890, chapter 14 of the Acts of the 23 G. A. took effect. Section three of that act provided for sealed proposals after giving public notice which was required to state "as nearly as practicable the extent of the work, the kind of materials to be furnished, when the work shall be done, and at what time the proposals shall be acted upon." This act was originally applicable only to cities acting under spe-
52 cial charters. By chapter 12, Acts 24 G. A., in force April 5, 1892, chapter 14, Acts of the 23 G. A., was made applicable to all cities having a population of over four thousand, and hence applied to the city of Des Moines. The resolution of the city council ordering these improvements made was passed May 11, 1891; also a like resolution on February 1, 1892. The notice for proposals for this paving was published between February 8, 1892, and February 27, 1892, and the material part thereof is as follows:

"Sealed proposals will be received by the board of public works of the city of Des Moines at their office, in the city hall, until 12 o'clock noon, February 29, 1892, for paving with brick East Grand avenue from Eighteenth street to the west line of the fair grounds, according to the plans and specifications for said work now on file in our office." * * * March 15, 1892, the contract was awarded by said board to J. B. Smith & Co. and a contract was signed by the parties on the same day; said contract contained the following provision: "It is hereby expressly understood that the above contract shall be approved by the city council before the same shall be binding upon said city." April 15, 1892, said contract was approved by the city council. From the foregoing facts it will be ob-
53 served that after the passage of the two resolutions by the council and the publication of the proposals by the board of public works and the reception of the bids and the making of the contract by the board with Smith & Co., chapter 14 of the Acts of the 23 G. A. which had been passed in 1890, and was only applicable to cities acting under special charters, became by virtue of chapter 12 of the Acts of the 24 G. A. which went in force April 5,

1892, applicable to the city of Des Moines, and that after it was so in force the contract previously made for the improvements by the board of public works was approved by the city council. The question is therefore presented as to whether the contract for the paving was so completed prior to April 5, 1892, as that it was not affected by the act of the 23 G. A., or must its validity be determined with reference to the provisions of said last-mentioned act? Appellant's claim that, as the contract had not been approved by the city council prior to the taking effect of the act of the 23 G. A., it had no binding force as a contract, and that all that had been done amounted simply to a proposition on the part of the contractor to do the work upon certain terms, and as before the contract was in fact approved the prior act was repealed, all the proceedings were ineffective, and the new statute prescribed the conditions under which such street improvements should thereafter be made.

54 It must not be forgotten that chapter 5 of the Acts of the 23 G. A., which was in force when the council ordered the work done, when the notice was published, when the bids were received, and the contract signed, did not require the contracts of the board of public works for paving to be made subject to the approval of the city council. That act expressly authorized said board to make such contracts in the name of the city, to make a completed contract which would be binding upon the city without any act of approval of the council; but the same legislature passed the act creating the board of public works, in which act it was provided that all contracts made by the board should be subject to the approval of the city council. This act was approved April 9, 1888, but took effect on July 4, 1888. The other act, which did not require such contracts to be approved by the council, was approved April 16, 1888, and took effect April 21, 1888.

It is therefore the later declaration of the legislative will, although it took effect about seventy days earlier than the other act. We should, if possible, so construe these two acts as to give both of them force and effect. This may be done by holding that the proper preliminary steps had been taken, and that the board of public works had power to enter into the contract binding

55 the city for curbing, paving, and sewering without any approval of the city council; but in case of other contracts such approcal was necessary. The advertisement of the board did, as we have seen, contain the provision that the contract was subject to the approval of the city council. Under the construction we have given to these two statutes this provision of the contract was wholly unnecessary. Having full power by statute to enter into a contract for this work which would bind the city as well as the contractor, the provision requiring the approval of the city council was contrary to the legislative intent and inoperative. The fact that thereafter the council did approve of the contract in no way affected it.

As no approval was necessary, the contract was complete and binding prior to the taking effect of the act of the 24 G. A., which made the act of the 23 G. A. applicable to the city of Des Moines.

Therefore said act of the 23 G. A. is not applicable to the case

presented. The advertisement of the board sufficiently complied with the statute applicable thereto.

3. The decree orders a special execution for the sale of the lots and provides for the issuance of a general execution against the plaintiff to make any balance which may remain after ex-
56 hausting the property on the special execution. It is claimed that the statute does not authorize such a decree, and that the liability of the plaintiff ends when his property subject to the assessment has been exhausted in payment of it. We considered this question of personal liability recently in the case of Farwell *vs.* Des Moines Brick Manufacturing Company, 66 N. W. Rep., 177, and held that such a decree and personal liability was warranted and authorized by the statute. On reconsidering the question in the light of the exhaustive arguments in this case, we are still content with our former holding.

4. Counsel urge that the imposition of such a personal liability in excess of the value of the property is in violation of the State and Federal constitutions. This same question as to our State constitution was raised and considered in City of Burlington *vs.* Quick, 47 Iowa, 226, and it was there held that such personal liability was not in contravention of the constitution and might be enforced. Reliance is placed upon Newman *vs.* Smith, 50 Mo., 529, and Palmer *vs.* Taylor, 31 California, 240. Both of these cases were considered in the case cited from the Forty-seventh Iowa and held not applicable. Penoyer *vs.* Neff, 95 U. S., 714, was a case involving the question whether a personal judgment could be rendered
57 against a non-resident upon service by publication alone, and it was held it could not be. Craw *vs.* Village of Tolono, 96 Ill., 255, involved the construction of a provision of the constitution of the State of Illinois materially different from that of our State. Three of the justices dissented from the opinion. Neither of these cases sustain appellant's contention.

It is said that plaintiff is a non-resident; that he was not served with notice, and that to render such a personal judgment is taking his property without due process of law. The law under which these proceedings were had was a public statute, of which all persons interested, whether residents or non-residents, were bound to take notice. He must be presumed to have known that this improvement might be made; he is charged with notice of it, and if he had any defense to interpose he should act timely.

He is presumed to know that the statute authorized a personal judgment for the amount of such improvements. Having subjected himself to the jurisdiction of the courts of this State and invoked their aid, he is in no position to say that because a personal judgment has been entered against him in conformity with the laws of this State he is thereby being deprived of his property without due process of law. Without setting out the provisions of the
58 State and Federal constitutions relied upon, we may say that they are substantially the same.

The Supreme Court of the United States defines due process of law to mean "that there can be no proceeding against life, liberty,

or property which may result in the deprivation of either without the observance of those general rules established in our system of jurisprudence for the security of private rights."

Hurtado *vs.* California, 110 U. S., 536; 4 Sup. Ct. Rep., 111.
Hagar *vs.* Reclamation Dist., 111 U. S., 701; 4 Sup. Ct. Rep., 667.
Davidson *vs.* New Orleans, 96 U. S., 97.

In the last case cited it is said:

"And lastly and most strongly it is urged that the court rendered a personal judgment against the owner for the amount of the tax, while it also made it a charge upon the land. It is urged with force, and some highly respectable authorities are cited to support the proposition, that, while for such improvements as this a part or even the whole of a man's property connected with the improvement may be taken, no personal liability can be imposed upon him in regard to it. If this were a proposition coming before us sitting in a State court, or perhaps in a circuit court of the United States, we might be called upon to decide it, but we are unable to see that any of the provisions of the Federal Constitution authorizes us to reverse the judgment of a State court on that question. It is not one which is involved in the phrase 'due process of law,' and none other is called to our attention in the present case."

State *vs.* Certain Lands in Redwood County (Minn.), 42 N. W. Rep., 473:

59 Evidently the judgment is not open to the objection urged, that it is a taking of property without due process of law. There is no force in the claim that plaintiff did not have notice. As we have said, he is bound to know that authorized public improvements may be made, and the courts are always open for the prevention of any wrongful exercise of such power.

We have considered all of the questions argued by counsel and arrive at the conclusion that the decree of the district court was in all respects proper.

Affirmed.

60 And on the same day a final judgment was rendered in said cause, the entry thereof being in the words and figures following, to wit:

C. P. DEWEY, Appellant,
vs.
CITY OF DES MOINES, C. H. DILLWORTH, Treasurer of Polk County, and Des Moines Brick Manufacturing Co., Appellees.
} Appeal from Polk District Court.

In this cause the court, being fully advised in the premises, file their written opinion affirming the judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of procedendo issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $98.75, and that execution issue therefore."

60½ And afterwards there were filed in the office of the clerk of said court writ of error, bond, and citation, and the same are hereto attached in original form and transmitted herewith as part of this transcript, true copies thereof being retained in the office of the said clerk.

61 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Iowa, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between C. P. Dewey, appellant, and The City of Des Moines, C. H. Dilworth, treasurer of Polk county, and The Des Moines Brick Manufacturing Company, appellees, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution
62 or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Clerk supr. c't: Please file this as of day rec'd by you. Filed Jun- 1, 1897. C. T. Jones, clerk supreme court.

63 Know all men by these presents that we, Charles P. Dewey, as principal, and Charles T. Killen, as surety, are held and firmly bound unto City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company in the full and just sum of twelve thousand ($12,000) dollars, to be paid to the said City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a term of the district court of Polk county, Iowa, in a suit depending in said court between Charles P. Dewey, plaintiff (designated as C. P. Dewey), and City of Des Moines, C. H. Dilworth, treasurer of Polk county, and Des Moines Brick Manufacturing Company, defendants, a judgment was rendered against the said Charles P. Dewey (designated in said suit as C. P. Dewey), and upon appeal by said Charles P. Dewey to the supreme court of Iowa said judgment was affirmed, and the said Charles P. Dewey having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said City of Des Moines, C. H. Dilworth, treasurer of Polk county, and the Des Moines Brick Manufacturing Company, citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles P. Dewey shall prosecute his error proceedings to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHARLES P. DEWEY. [SEAL.]
CHARLES T. KILLEN. [SEAL.]

Sealed and delivered in presence of—
GEO. W. KEMP.
WM. L. K. SMITH.

Allowed as supersedeas by—
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.
May 28th, '97.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I hereby certify that I have sworn and examined the principal and surety of the within bond and find them sufficient security therefor.

Chicago, May 26, 1897.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

S. W. BURNHAM, *Cl'k.*

[Endorsed:] Filed Jun- 1, 1897. C. T. Jones, clerk supreme court.

64 UNITED STATES OF AMERICA, *ss:*

To the City of Des Moines, C. H. Dilworth, treasurer of Polk county, and the Des Moines Brick Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein C. P. Dewey is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable David J. Brewer, associate justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and ninety-seven.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

65 Due and legal service of the within citation, with copy, is hereby accepted at Des Moines, Iowa, this third day of June, A. D. 1897.

J. K. MACOMBER,
Attorney for City of Des Moines and C. H. Dilworth, Treasurer of Polk County, Iowa.
N. T. GUERNSEY,
Successor to Guernsey & Baily, Att'ys for Des Moines Brick Manufacturing Company.

Witness:
WILLIAM CONNOR.

[Endorsed:] Filed Jun- 1, 1897. C. T. Jones, clerk supreme court.

66 STATE OF IOWA, *ss:*

I, C. T. Jones, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a full, true, and correct transcript of

the record, decision, and *and* final judgment in the case of C. P. Dewey, plaintiff in error, against City of Des Moines, C. H. Dillworth, tres., and Des Moines Brick Manufacturing Company, defendants in error.

And I further certify that the original writ of error, bond, and citation are hereto attached and made a part of the return to said writ of error, and this return is made in obedience to said writ.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and official seal this 7th day of June, 1897.

C. T. JONES,
Clerk Supreme Court Iowa.

[Endorsed:] Supreme Court U. S. Received Jun- 10, 1897. Clerk's office.

67 In the Supreme Court of the United States, October Term, 1897.

C. P. DEWEY, Plaintiff in Error,
vs.
CITY OF DES MOINES, C. H. DILWORTH, Treasurer of Polk County, Iowa, and Des Moines Brick Manufacturing Company, Defendants in Error.
} Error to Supreme Court of Iowa.

Assignments of Error.

The above plaintiff in error makes the following assignments of error as grounds for the review of a certain final judgment in the supreme court of Iowa in the above-entitled cause, made and entered at the October, 1896, term of said court, to wit, on the 7th day of April, 1897, the said court being the highest court of the said State of Iowa and the highest and last court of said State to which said cause could be carried by said plaintiff in error.

It appears from the record in said cause, and especially from the pleadings, stipulations, and findings of the trial court therein, that the plaintiff in error is and at all times since the pendency of the proceeding complained of has been a citizen and resident of the city of Chicago, State of Illinois.

That he was and is the owner in fee-simple of sixty lots in a certain subdivision called "Central Park," said lots being numbered consecutively from (17) seventeen to (76) seventy-six, inclusive; that said Central Park was surveyed and platted into lots, and said plat filed in the office of the county auditor of Polk county, Iowa (the county in which said lots are situated), in the year 1886; that when said Central Park was platted and divided into lots said lots
68 were situated outside of the corporate limits of the city of Des Moines; that by the provisions of chapter one, Acts 23 G. A. of Iowa, 1890, it was claimed that Central Park and other

territory in the neighborhood, being two and one-half miles eastward of the former boundary of said city, were annexed to and became a part of the city of Des Moines, but the plaintiff in error has at all times maintained that said alleged annexation was illegal and void.

It further appears that in the month of May, 1891, the city council of Des Moines declared that it was necessary to pave and curb East Grand avenue and proceeded by contract to pave and curb East Grand avenue from 18th street to the State fair grounds; that the lots belonging to the plaintiff in error lie abutting to said East Grand avenue; that as his share of the cost of said paving and curbing there was assessed against the said lots of the plaintiff in error the aggregate sum of $8,928.00, which was made a lien on said lots; that the plaintiff in error has always refused to pay said assessment, claiming the same to be illegal and void, and on April 30th, 1894, brought a suit in equity in the district court of Polk county to set aside said special assessment for paving and curbing.

Judgment was rendered against the plaintiff in error in the district court, and upon appeal to the supreme court of Iowa the final judgment of said district court was in all things ratified and confirmed by the supreme court of Iowa and became and is in effect the final judgment of said last-named court.

It appears by stipulation and demurrer that the defendants in error admitted the following facts:

First. That the plaintiff in error had no actual notice or knowledge of the action of the city council aforesaid until he applied, in 1894, to the county treasurer of Polk county for a statement
69 of his general taxes on said lots, and no constructive knowledge except such as might be offered by publications in newspapers in the city of Des Moines.

Second. That the amount of said taxes for paving and curbing is greater than the reasonable market value of said lots, whether considered singly or otherwise, the assessment against each particular lot being greater in amount than the value of said lot and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together.

Third. That at the time of the making of such assessment the city council of Des Moines well knew that the costs of paving and curbing said street would exceed the market value of the abutting lots owned by the plaintiff in error and others.

Fourth. That the defendants in error are seeking to enforce against the plaintiff in error not merely a sale of said lots, but also to compel him to pay the full amount of said tax, regardless of whatever sum said lots may be sold for and regardless of their actual value.

Fifth. That said paving and curbing *was* ordered solely on account of the supposed benefit which would accrue to the State Agricultural Society in holding its annual State fair.

Sixth. That there was no actual necessity for paving or curbing said street, so far as the property or interests of persons residing or owning property along said street was concerned.

Seventh. That for more than a mile on said street on that part on which plaintiff's lots abutt there are only four small and cheap houses, and some of them were not built when the paving and curbing was ordered.

Eight. That along said street, in the space mentioned, there are no stores, shops, factories, or buildings of any description whatever except the four houses mentioned.

70 Ninth. That all the property-holders on both sides of the street between 18th street and the State fair grounds, a distance of more than a mile, were opposed to the paving and curbing of said street at the expense of the abutting property.

Tenth. That said city council, at the solicitation and sole instance and for the benefit alone of the State Agricultural Society and its directors, when there was no actual necessity or real occasion therefor otherwise, passed said resolutions declaring the existence of a necessity for —, and ordered said paving to be done, and approved and accepted said work, and levied said tax, and is now seeking to enforce the same against the property of the plaintiff in error and of others abutting on said street.

The district court of Polk county, Iowa, by its judgment sustained the validity of said tax and rendered a personal judgment against the plaintiff in error for the sum of $11,655.50, with interest from November 18th, 1895, and decreed that for any balance of said judgment remaining unsatisfied after the sale of said sixty lots a general execution shall issue against the plaintiff in error. This judgment and decree was in all respects confirmed by the judgment of the supreme court of Iowa.

In such judgment and decree there is manifest error, in this, to wit:

First. The levy and enforcement by lien of said paving tax, for the sole benefit of the public, upon the property of the plaintiff in error to an amount equal to or exceeding the value of the same is a taking of private property for public use without just compensation, in violation of the fifth amendment of the Constitution of the United States and section 18, article one, of the constitution of the State of Iowa.

Second. That the imposition of a personal liability against
71 the plaintiff in error for any amount of said tax unsatisfied after the sale of the said lots is not due process of law, and is in violation of the fourteenth amendment of the Constitution of the United States.

Third. That the said judgment is not sustained or procured by due process of law, for the reason that the supreme court of Iowa, in case of State *ex rel.* West *vs.* City of Des Moines, 65 N. W. Rep., 818, has formally adjudged and decreed that the act of annexation under and by authority of which said paving tax was assessed is unconstitutional and void, of which judgment this court will take judicial notice, and therefore all acts of the city officers by virtue of said statute are void.

Wherefore said plaintiff in error respectfully prays that the said judgment of the supreme court of Iowa against him may be re-

versed, modified, vacated, or set aside, as may appear to be required by law.

ANDREW E. HARVEY,
Solicitor for Plaintiff in Error.

Endorsed on cover: Case No. 16,608. Iowa supreme court. Term No., 395. C. P. Dewey, plaintiff in error, *vs.* The City of Des Moines, C. H. Dilworth, treasurer of Polk county, and The Des Moines Brick Manufacturing Company. Filed June 11, 1897.